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No. 06-1603

Supreme Court, U.S.
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In The
Supreme Court of the United States

ROSALINE KENNEDY,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

H. Glenn Fogle, Jr.
Counsel of Record
THE FOGLE LAW FIRM, LLC
The Grant Building, Suite 709
44 Broad Street, NW
Atlanta, Georgia 30303
(404) 522-1852

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street, NW • Suite 475 • Washington, DC 20006
(202) 955-0001 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTIONS PRESENTED

1. Whether the 180-day time period to file a motion to reopen *in absentia* removal proceedings based on exceptional circumstances, set out in section 240(b)(5)(C)(i) of the Immigration and Nationality Act (hereinafter "INA"), codified at 8 U.S.C. § 1229a(b)(5)(C)(i), is equitably tolled where the alien demonstrates that ineffective assistance of counsel prevented her from discovering the *in absentia* removal order until after the 180 days had expired.

2. Whether the 180-day time period to file a motion to reopen *in absentia* removal proceedings, set out in INA § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i), is jurisdictional.

3. Whether the Eleventh Circuit should have adopted an equitable tolling doctrine based on ineffective assistance of counsel where eight other Circuits have adopted such a rule.

PARTIES TO PROCEEDING

The Petitioner is Rosaline Kennedy. The Respondent is Alberto Gonzales, the Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

Rosaline Kennedy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. (App. 1a). The opinion of the Board of Immigration Appeals affirming the final order of removal is unreported. (App. 6a). The opinion of the Immigration Judge denying relief from removal is unreported. (App. 10a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Section 240 of the Immigration and Nationality Act, codified at section 1229a of Title 8 of the United States Code provides:

(b) Conduct of proceeding

(5) Consequences of failure to appear

(A)In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the attorney general shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

* * *

(C) Rescission of order

Such an order may be rescinded only –

(1) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section.

* * *

(e) Definitions
In this section and section 1229b of this title:

(1) Exceptional circumstances
The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable
The term removable means –

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

STATEMENT

This case involves the issue of whether the 180-day time limit for filing a motion to reopen *in absentia* removal proceedings, pursuant to INA § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i), is equitably tolled where the alien demonstrates that ineffective assistance of counsel prevented her from learning that an *in absentia* removal order had been entered until long after the 180 days had expired. The Eleventh Circuit refused to adopt such a rule in

this case, holding that the 180-day time limit is jurisdictional. The First, Second, Third, Fourth, Sixth, Seventh, Ninth, and Tenth circuits have held the opposite. Hence, to resolve this split in the Circuits, this Honorable Court should grant a writ of *certiorari* in this case.

Petitioner, a native and citizen of Brazil, came to this country in 1996 as a visitor authorized to remain for six months. Petitioner overstayed that visa and in 2002, married a U.S. citizen, who filed an I-130 petition for alien relative n her behalf with the legacy Immigration and Naturalization Services, now U.S. Citizenship and Immigration Services (hereinafter "CIS"). The marriage did not last, and Petitioner's husband withdrew the petition in May 2003. After Petitioner's first marriage was annulled in June 2003, she started a relationship with Buck Williams, a U.S. citizen, and eventually moved in with Williams. She had her mailing address changed to a Post Office box, to which mail was being forwarded from her old address. She did not inform CIS of her new address because she had no applications pending before CIS at that time.

In May 2003, Petitioner and Williams met with Kenneth Hatcher, an immigration attorney, and paid him a retainer of $1065 in anticipation of getting married and filing for adjustment of status for Petitioner. In December 2003, Petitioner received a copy of a Notice to Appear (hereinafter "NTA") from Immigration and Customs Enforcement (hereinafter "ICE"), which had been forwarded to the P.O. box from her earlier address. ICE and CIS are both divisions of the Department of Homeland

Security (hereinafter "DHS"). The NTA charged Petitioner with removability based on the overstay of her visitor visa. It requested her appearance at a date to be determined, indicating that she would receive notice at the address she had provided when the hearing was calendared. The NTA included a warning that she was required to inform DHS of any changes of address and that failure to appear at the hearing would result in her being ordered removed *in absentia*.

In January 2004, Petitioner met with Hatcher to seek his advice about the NTA. Hatcher told Petitioner to wait to receive her notice of the hearing date, which could take 12 to 18 months. He did not tell her that she needed to file a change of address with DHS. He did not call the Immigration Court information line to find out if Petitioner already had a hearing scheduled.

On February 12, 2004, Petitioner married Williams. Hatcher filed the adjustment applications on their behalf. They received an interview notice for July 12, 2005, in Charlotte, North Carolina. They met with Hatcher to prepare for the interview, and told him they were concerned that they had never received a hearing notice. At this point, Hatcher finally called the Immigration Court information system and learned that Petitioner had been ordered removed *in absentia* on March 16, 2004.

On July 12, 2005, Hatcher filed a motion to reopen *in absentia* removal proceedings on Petitioner's behalf. Hatcher argued that the

proceedings should be reopened because Petitioner had not received actual notice of the hearing date. The IJ denied this motion, finding that Petitioner was chargeable with notice because she had failed to keep DHS informed of her current address.

Petitioner then retained new counsel and filed a second motion to reopen on August 31, 2005, this time alleging that her failure to appear at her hearing was due to exceptional circumstances, in that she had received ineffective assistance of counsel. In compliance with Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), Petitioner included her affidavit explaining counsel's ineffective actions and an affidavit of Hatcher.

On September 22, 2005, the IJ denied the second motion to reopen, finding that Petitioner had failed to comply with the requirements of Matter of Lozada, and reiterating that the NTA provided Petitioner with notice of her requirement to keep the Immigration Court informed of her address. Petitioner then filed a motion to reconsider, pointing out that, although she had not filed a bar complaint against Hatcher, she had complied with Matter of Lozada by explaining her reason for not filing a bar complaint. Moreover, in an abundance of caution, Petitioner filed a bar complaint after the IJ's decision and submitted a copy of that complaint with her motion to reconsider. The IJ denied the motion to reconsider, finding that, although the Ninth Circuit has announced a doctrine of equitable tolling that might have applied to Petitioner's ineffective assistance claim, the Eleventh Circuit has no such doctrine.

Petitioner appealed the IJ's denial of the motion to reopen to the BIA, arguing, *inter alia*, that the BIA should adopt the doctrine of equitable tolling as applies to her ineffective assistance claim. The BIA denied the appeal on other grounds, declining to consider Petitioner's exceptional circumstances claim because not one of her three motions was filed within the 180-day time period, which the BIA held to be jurisdictional.

Petitioner petitioned for review of the BIA's decision with the Eleventh Circuit Court of Appeals. The Eleventh Circuit denied the petition, holding that, under its precedent set out in Anin v. Reno, 188 F.3d 1273, 1278 (11th Cir. 1999), 180 day time limit for filing a motion to reopen was "jurisdictional and mandatory." Kennedy v. U.S. Attorney General, No. 06-14750, manu. op at 3-4 (11th Cir. April 4, 2007). Hence, the Eleventh Circuit held that it did not recognize equitable tolling based upon alleged ineffectiveness of counsel. Id. at 4.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's refusal to adopt an equitable tolling doctrine in this circumstance creates a true split in the Circuits, as eight other Circuits have adopted such a doctrine. Moreover, the Eleventh Circuit's failure to adopt the doctrine leaves Petitioner in a situation where she is made to suffer the severe hardship of removal from the United States in spite of, and in fact because of, the deficient performance of her attorney. This deprivation of Petitioner's liberty was so

fundamentally unfair as to deny Petitioner her due process rights and prejudice the outcome of her case.

1. The Law of *In Absentia* Removal

An alien who fails to appear at his removal hearing after proper notice shall be ordered removed "if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." INA § 240(b)(5), 8 U.S.C. § 1229a(b)(5). The *in absentia* order may be rescinded if: (i) a motion to reopen is filed within 180 days of the order and the person demonstrates that there were exceptional circumstances; or (ii) a motion to reopen is filed at any time and the person can demonstrate that failure to appear was due to lack of proper notice in accordance with INA § 239. INA § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C).

Aliens enjoy the right to effective assistance of counsel in removal proceedings. Mejia-Rodriguez v. Reno, 178 F.3d 1139, 1146 (11th Cir. 1999). This right derives from the Due Process Clause of the Fifth Amendment, as opposed to the Sixth Amendment. Id. Thus, to establish the ineffective assistance of counsel in the context of a deportation proceeding, an alien must establish that her counsel's performance was deficient to the point that it impinged the "fundamental fairness" of the hearing. Id. The alien must establish deficient representation and prejudice arising from this deficient representation. Id. The BIA has held that an alien alleging ineffective assistance of counsel who had satisfied the requirements of Matter of

Lozada had established exceptional circumstances for the purposes of rescinding an *in absentia* removal order. Matter of Grijalva-Barrera, 21 I&N Dec. 472, 473-474 (BIA 1996).

In Matter of Lozada, the BIA held that:

> A motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts. . . . [T]hat affidavit should include a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken on appeal and what counsel did or did not represent to the respondent in this regard. Furthermore, before allegations of ineffective assistance of former counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel or report of counsel's failure or refusal to respond, should be submitted with the motion. Finally, if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities

> regarding such representation, and if not, why not.

19 I&N Dec. 637, 638-39 (BIA 1988).

2. The majority of circuits recognize that the 180-day deadline is not jurisdictional

The First, Second, Third, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits all have held that the 180-day filing deadline for motions to reopen *in absentia* removal orders is not jurisdictional, and therefore have adopted equitable tolling doctrines in cases where the 180-day filing period was not met due to ineffective assistance of counsel. Jobe v. INS, 238 F.3d 96, 100-101 (1st Cir 2001) (recognizing equitable tolling, but dismissing because the alien failed to exercise due diligence); Iavorski v. INS, 232 F.3d 124, 129 (2d Cir. 2000) (concluding that the 180-day bar is not jurisdictional, but finding that the alien did not exercise due diligence); Borges v. Gonzales, 402 F.3d 398 (3d Cir. 2005); Akwada v. Ashcroft, 113 Fed. Appx. 532 (4th Cir. 2004); Scoreanu v. INS, 339 F.3d 407, 413 (6th Cir. 2003); Pervaiz v. Gonzales, 405 F.3d 488, 491 (7th Cir. 2005); Rodriguez-Lariz v. INS, 282 F.3d 1218, 1224 (9th Cir. 2002); Riley v. INS, 310 F.3d 1253, 1258 (10th Cir. 2002).

The Third Circuit has recognized that the 180-day time period for filing a motion to reopen an *in absentia* removal order is not jurisdictional but is more in the nature of a statute of limitations, which can be equitably tolled. In Borges, 402 F.3d at 398, the alien hired counsel who advised him that he did

not need to attend his removal hearing because he had a pending application for adjustment of status. Hence, the alien was ordered removed *in absentia*. Id. at 401. The alien's attorney filed a timely motion to reopen, but this motion only challenged the denial of a request for change of venue, and did not address the reasons for the failure to appear. Id. at 402. Acting on his attorney's advice and believing that his removal order had been vacated, the alien attended his adjustment of status interview and did not mention that he had been ordered removed. He was approved for permanent residence. The alien later called his attorney to ask whether it was okay for him to travel outside the United States since he had never received a green card in the mail. He was told at this point for the first time, more than two years after the *in absentia* order had been entered, that the order of removal never had been vacated. The attorney agreed to file a second motion to reopen, but never did so. The alien called the attorney regularly over the next two years, and the attorney led him to believe the motion had been filed and was still under consideration. In January 2003, five years after the *in absentia* order had been entered, the alien retained new counsel, who filed a second motion to reopen. Id. at 402-403.

The alien in Borges argued that the attorney's fraudulent representations "led the alien to believe that he had nothing to worry about and kept him from discovering how serious his situation was and that, in fact, he remained under an *in absentia* order of removal." Id. at 403. Hence, he argued that the 180 day period for filing the motion to reopen should be tolled until the date that he learned of the fraud.

Overruling the BIA, the Third Circuit held that the 180-day time limit was not jurisdictional because it was more in the nature of a statute of limitations. Id. at 406. The Court noted that there is no reference to jurisdiction in the statute or in the legislative history. It concluded that "[g]iven this silence, we see no 'good reason to believe that Congress did *not* want the equitable tolling doctrine to apply.'" Id. (citing United States v. Brockamp, 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 8181 (1997) (emphasis in original)). The Third Circuit also noted that it had long accepted the "old chancery rule" that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." Id. at 406 (citing Lopez v. INS, 184 F.3d 1097, 1100 (9th Cir. 1999)). It held that "[t]his equitable doctrine is read into every federal statute of limitation." Id. (*quoting* Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S. Ct. 582, 90 L. Ed. 2d 743 (1946) (emphasis in original)).

In Borges, the Third Circuit distinguished the Eleventh Circuit's decision in Anin v. Reno, 188 F.3d 1273, 1278-79 (11th Cir. 1999), which held that there is no "exception" to the 180-day rule based on ineffective assistance of counsel. Borges, 402 F.3d at 406. The Third Circuit held that "here, however, we are dealing with tolling to permit reopening after 180 days based on the allegations of fraud, not an exception on the ground of ineffective assistance of counsel to the 180-day time period excusing a failure to appear." Id. Hence, the Third Circuit concluded, Anin did not impact its analysis. Id.

3. Courts have recognized that ineffective assistance of counsel can be the basis for equitable tolling where it rises to the level of fraud

The Seventh Circuit has recognized that ineffective assistance of counsel can be a basis to entitle an alien to equitable tolling. Pervaiz v. Gonzales, 405 F.3d 488, 491 (7th Cir. 2005). In Pervaiz, an asylum applicant missed her individual hearing and was removed *in absentia* because the hearing was moved from 1 p.m. to 9 a.m., and notice of the change was sent only to her attorney and was not received. Id. at 489. The attorney filed a motion to reopen, but only addressed the adequacy of the notice and not the fact that the notice was never received. Id. The IJ denied this motion, and Pervaiz appealed that denial to the BIA. While the appeal was pending, Pervaiz retained another lawyer who filed a second motion to reopen before the BIA, arguing that the first motion would have been granted but for the ineffective assistance of former counsel. This second motion to reopen was filed one year and three months after the *in absentia* removal order. Id. The BIA denied the appeal of the first motion to reopen on the ground that the notice was adequate, and denied the second motion to reopen as untimely. Id. at 490.

The Seventh Circuit first found that the 180-day deadline is not jurisdictional and therefore was subject to equitable tolling, noting that several other circuits agreed. Pervaiz, 405 F.3d at 490. Next, the Court noted that the test for equitable tolling was not the length of the delay but whether the claimant

could reasonably have been expected to file earlier. Pervaiz, 405 F.3d at 490. The Court noted that, because it was manifestly unjust for the IJ to remove the alien *in absentia* when she was only four hours late for her hearing and her tardiness was based on not receiving notice, the alien could have reasonably expected for her motion to reopen to be granted. Id. at 490-491. When that motion was denied, the alien had to find another lawyer, and although it took her nine months to find the lawyer, have him review the case, prepare the motion and file it, the Court could not say as a matter of law that the BIA could not find the deadline equitably tolled. Id. at 491. The Seventh Circuit further found that Pervaiz could demonstrate ineffective assistance because her attorney failed to argue that lack of receipt of the notice of hearing excused her failure to appear, which would have been successful in that Circuit. Hence, the Court remanded that case.

The Ninth Circuit has found ineffective assistance that rose to the level of fraudulent where the alien's representative "wasted" the opportunity for filing a motion to reopen by filing a "worthless motion." Varela v. INS, 204 F.3d 1237, 1240 (9th Cir. 2000). In Varela, the alien's attorney advised him that he would be able to adjust his status based on marriage to a U.S. citizen after he accepted an order of voluntary departure as long as he applied before the deadline for him to depart. This information was incorrect, and the alien was served with an order of deportation when he did not depart. Id. at 1238. The attorney filed a motion to reopen, which was denied because it was untimely and he did not establish *prima facie* eligibility for adjustment of

status. The alien then hired new counsel, who filed a second motion to reopen, but the BIA affirmed the denial of that motion because the regulations prohibit aliens in deportation proceedings from filing *more than one* motion to reopen. Id. at 1239.

In granting the petition for review, the Ninth Circuit held that the alien was "defrauded by an individual purporting to provide legal representation." Varela, 204 F.3d at 1240. The Court noted:

> Garcia took Varela's money, but filed no papers for over ten months. When Varela inquired about his case, Garcia repeatedly assured him that he did not have to leave the United States when his grant of voluntary departure expired. Garcia wasted Varela's opportunity to reopen his deportation proceedings and apply for adjustment of status by filing a worthless motion. The motion served no purpose because it was filed after the statute of limitation had expired and provided no facts to justify equitable tolling.

Id. Hence, the Ninth Circuit granted the petition and remanded for the BIA to consider the merits of the motion to reopen. Id.

4. The Eleventh Circuit's refusal to adopt the reasoning favored by a majority of the Circuits is arbitrary and unreasonable

In denying Petitioner's petition for review, the Eleventh Circuit cited its precedent in Anin v. Reno, 188 F.3d 1273 (11th Cir. 1999), for its refusal to adopt equitable tolling. In Anin, an alien moved to reopen his in absentia removal order two years after it had been entered, arguing that his counsel had failed to give him notice of his hearing and then later told him that he already had the case reopened. 188 F.3d at 1275. The Eleventh Circuit affirmed the denial of the motion to reopen as untimely. The Court's reasoning was that "[n]o federal circuit has recognized an exception to the INA's 180 day filing deadline for exceptional circumstances to reopen a deportation order." Id. at 1278.

Accordingly, the Eleventh Circuit's rationale for refusing to adopt an exception to the 180-day filing rule for ineffective assistance of counsel is unreasonable. As can be seen from the discussion above, the line of cases in the other Circuits adopting equitable tolling all developed after the Eleventh Circuit decided Anin in 1999. The reasoning in Anin no longer applies, because several circuits now have adopted that exception. Hence, it was unreasonable of the Eleventh Circuit to rely on Anin in denying Petitioner's case.

The Eleventh Circuit's refusal to consider equitable tolling in this case amounts to a clear violation of Petitioner's due process rights.

Petitioner had a clear avenue for relief from removal in that she was married to a U.S. citizen. Petitioner was prevented from going to court and applying for that relief solely based on the deficient actions of her attorney. For the Eleventh Circuit to refuse to remedy counsel's actions due to an arbitrary time limit is in clear violation of his Fifth Amendment right to due process of law. Therefore, this honorable Court should act to cure a Circuit split and to remedy a clear constitutional error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

H. Glenn Fogle, Jr.
Attorney for Petitioner